Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

SEA-FONE, LIMITED,

Petitioner,

vs.

COMMUNICATIONS SATELLITE CORPORATION (COMSAT),

Respondent,

-and-

CATHERINE L. ROBINSON; CHARLES V. BAKER and SOARTA, LIMITED,

Third-Party Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the definition of the relevant market in a private antitrust suit is a question of fact for the jury; and, if not, what are or should be the objective circumstances and guidelines to achieve uniformity of decisions, avoid arbitrariness, and preserve the parties' constitutional right to trial by jury?

2. Whether, in a monopoly market in which a competitor enters by substantially cutting the price to certain initial, targeted customers and the monopolist responds by offering low prices to those targeted customers, the relevant market is the monopoly market or just those few targeted customers? In this case, is the market "ship-to-shore telephone service for United States Naval personnel" of which the Respondent has a 97% share, or is the market confined to the "*low cost* ship-to-shore telephone service for United States Naval personnel" that the Petitioner initiated by its entry?

3. Whether the lower court's characterization of the evidence as Petitioner's "frustration in attempting to compete" is a usurpation of the function of the jury, thereby depriving the petitioner of its right to trial by jury under the Seventh Amendment and the teaching of this Court's prior decision that

> the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an *essential* part of the congressional plan for making competition rather than monopoly the rule of trade. . . .

Beacon Theatres v. Westover, 359 U.S. 500, 504 (1959) (emphasis added).

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Petitioner Sea-Fone, Limited ("Sea-Fone") respectfully petitions that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

On March 1, 1996, the district court filed its order granting summary judgment against Sea-Fone, attached hereto as Appendix C.

On April 4, 1996, the district court filed its order denying Sea-Fone's motion for reconsideration, attached as Appendix B.

On July 8, 1997, United States Court of Appeals for the Fourth Circuit filed its decision affirming the summary judgment of the lower court, attached hereto as Appendix A.

On August 5, 1997, the Court of Appeals filed its order denying the Sea-Fone's Petition for Rehearing and Suggestion for Rehearing en Banc, attached hereto as Appendix D.

STATEMENT OF JURISDICTION

In addition to other federal claims, this action was brought pursuant to section 4 of the Clayton Antitrust Act (15 U.S.C. § 15) alleging violations of sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1, 2). The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on July 8, 1997. The Court of Appeals denied a timely petition for rehearing on August 5, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Seventh Amendment to the Constitution of the United States, the Sherman Antitrust Act, sections 1 and 2 (15 U.S.C. §§ 1, 2), and the Clayton Antitrust Act, section 4 (15 U.S.C. § 15).

STATEMENT OF THE CASE

Sea-Fone's antitrust claim arises out of the actions of Respondent (Commercial Satellite Corporation, hereinafter "Comsat") to thwart and block Petitioner (Sea-Fone Limited, hereinafter "Sea-Fone") from offering low cost, convenient, and superior telephone services to sailors on board United States Naval vessels. Comsat has exclusive control of INMARSAT satellite communications into and out of the United States, inclusive of all such communications between United States Naval ships and the continental United States. These communications include all telephone calls made to home by sailors on United States Naval ships. For at least the five-year period ending in the summer of 1994, Comsat had installed its ship-to-shore telephone call systems, called "Smart Phone," on at least 229 United States naval ships. As of the summer of 1994, the 229 or more ships serviced by Comsat constituted 100% of the market for ship-to-shore telephone services; that is, Comsat had a complete monopoly for the provision of satellite telephone services to on-board Naval personnel. Up to and including the summer of 1994, Comsat, by reason of its monopoly power, charged sailors a minimum of $6.25 per minute when and if the sailors could get access to the limited number of phones on board.[1]

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1. Comsat provided one or two telephones per vessel, usually located inconveniently in the hangar area of even the larger aircraft carriers. Also,

(Cont'd)

On several occasions between 1992 and the summer of 1994, the Navy requested Comsat to provide better service and lower prices. Comsat declined to do either. In the fall of 1994, Sea-Fone, offering a lower price and a technologically superior system, entered the ship-to-shore telephone market for United States Naval personnel. Comsat agreed to provide Sea-Fone with the INMARSAT satellite channel hookup (the only available hookup) for a flat fee of $45,000 per month, so long as there would be no risk to Comsat.

Offering its innovative technology solution, Sea-Fone submitted a bid to provide ship-to-shore telephone services to sailors on board the aircraft carrier *USS Dwight D. Eisenhower* ("CV69") at a price to sailors of $1.00 per minute, rather than the $6.25 per minute charged by Comsat, an 84% decrease of Comsat's price.

After only the first two weeks at sea, the Commander of the *USS Eisenhower* cabled the following:

> The sailor phone system on IKE is an *unqualified success*. In the 15 days since its commissioning one thousand 30 minute cards and four thousand eight hundred 15 minute cards have been sold. . . . 7065 phone calls, averaging 8 minutes per call have been recorded. . . . IKE's *number one quality of life issue* has had a tremendous *positive impact* on morale by making it possible for IKE's crew members to reach out and touch their families and love ones. . . . I would

---

(Cont'd)
Comsat's service was interruptable, *i.e.*, channel availability could be pre-empted. In contrast, in addition to the lower prices, Sea-Fone offered 8 phones per ship, conveniently located near crew quarters, and continuous open channel services 24 hours per day, 7 days a week.

> like to extend . . . my personal thanks and the thanks of every man and woman on the Ike.

(Appendix 460, emphasis added.)[2]

By reason of this "unqualified success," the Navy assured Sea-Fone that its contract would be modified to include other ships:

> As more ships are installed with equipment which utilizes SEA-FONE telephone debit cards, *I can assure you* that the SEA-FONE *contract will be modified* to allow sales of the cards to those ships. This is accomplished by an administrative modification which normally takes *only one day* to complete.

Appendix 495, emphasis added.

Less than two weeks after the *Eisenhower* report, Comsat, alarmed by Sea-Fone's success, began to plot the elimination of Sea-Fone as a competitor:

> *SEA-FONE's revenue* from the deployment will be *$900,000* and *profit* approximately *$262,000. . . . Our profit* from providing the satellite connection through OOB is *$160,650. . . . If we use the SEA-FONE model,*[3] *our profit would be $422,650. . . .* In this case, *both*

---

2. "Appendix" refers to the appendices of documents filed in the Court of Appeals.

3. One of Sea-Fone's allegations was that Comsat stole its trade secrets, which it did. The Court of Appeals did not even address that allegation and the district court summarily dismissed this allegation without reason.

> *revenue and profit* could be *increased* significantly *over* the Smart Card Program.

Appendix 202 (emphasis added).

In furtherance of maintaining its monopoly over the rest of the U.S. Naval fleet, Comsat employed a series of monopolistic and anticompetitive maneuvers to exclude Sea-Fone from the market and, ultimately, to destroy this small, innovative company.

First, Comsat decided to refuse to deal with Sea-Fone:

> Allowing SEA-FONE to provide this [competitive] service appears to be in direct conflict with my understanding of Comsat Mobile *not reselling INMARSAT* services.[4]

Appendix 461A (emphasis added).

Second, Comsat interfered with Sea-Fone's contracts with the Navy:

> Call objective . . . to inform the customer [the Navy] of our intention to *displace SEA-FONE*. . . . They [the Navy] had begun contract negotiations with SEA-FONE . . . [for] *aircraft carriers*. They are putting a *stop* to all encompassing contract and *will limit SEA-FONE* to the Ike's (CVN69) deployment.

Appendix 324 (emphasis added).

4. Sea-Fone also claimed violation by Comsat of the Federal Communication Act. The Court of Appeal said nothing about that claim, even though this extraordinary admission, alone, supports a violation of that Act, or at the very least creates a question of fact for the jury.

Comsat was successful. Just one week after the Navy had given its commitment to Sea-Fone, Comsat proclaimed victory as a result of its efforts: The Navy

> does not intend to modify her existing contract beyond CVN69 (Ike).

Appendix 496.

Having successfully blocked Sea-Fone from direct access to the Navy, Comsat, in furtherance of its scheme to eliminate Sea-Fone, refused to sell open channel access to Sea-Fone:

> CMC [Comsat Mobile Communications] regrets that it cannot support any additional services [to Sea-Fone] beyond those under contract [the *Eisenhower*].

Appendix 377.

One week later, Comsat's executive management memorialized both its plan to exclude Sea-Fone and its motive behind the plan:

> We propose to offer the U.S. Navy a Comsat branded Debit Card Service until implementation of our own service. . . . Based upon the success of [Sea-Fone's] Out of Band Debit Card Service currently being provided by the partnership composed of Comsat, MCI and Sea-Fone, Ltd., we propose to offer this service directly to the U.S. Navy A sole-source contract between U.S. Navy and Comsat is pending.

Appendix 379.

The two most dramatic results of Comsat's monopolistic

and anticompetitive conduct were: (1) the elimination of Sea-Fone, the small, innovative company which offered a superior technology solution at a substantially lower price to sailors; and (2) the continued bondage of the sailors on 97% of United States Naval vessels, who are still required to pay the exorbitant minimum of $6.25 per minute to use the inferior Smart Phone system to call home.

As Wayne D'Ambrosio, Comsat's Manager for Government Sales, confirmed during pretrial discovery:

> Q: . . . Sprint has four boats and SEA-FONE has two. So, out of the 200 or so, only six are serviced by anyone other than Comsat with regard to the ability of the sailor to call home: is that right? Is that Right?
>
> A: Yes it is. And the reason that it's right is because we have a contract[5] with the government to provide INMARSAT at $6.25 a minute, which we've had now for approximately five years.

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5 This contract, entered into in the late '80s and early '90s, required that the Navy could not use transmitting equipment installed by Comsat without Comsat's approval. Comsat used it as leverage and one of the means to "wire" contracts with the Navy, to "reclaim our turf," to "keep potential competitors off of the CV (aircraft carriers)," and to deter Sea-Fone, specifically:

> We have seen on both these vessels (Roosevelt and America) it has proven to be *a deterrent for potential competitors, i.e., SEA-FONE*. . . . If we do not respond, we will lose all debit card and smart card revenue from these vessels. . . . We will lay claim to the area and can *keep others off*. Once we lose the spot, we may never get it back!

Appendix 254.

> Q: So, you — COMSAT provides — COMSAT has 97% of the market with regard to vessels that allow their sailors to call home; is that true?
>
> * * *
>
> Q: Is that true?
>
> A: Yes.

D'Ambrosio deposition, p. 184.

On September 1, 1995, Sea-Fone filed suit against Comsat charging, *inter alia*, violation of the Sherman Antitrust Act.[6] On March 1, 1996, the district court granted Comsat's motion for summary judgment on Sea-Fone's antitrust claim, without providing any factual or legal analysis or reasoning whatsoever, notwithstanding the fact that Sea-Fone enumerated 51 specified issues of material fact based on a record of over 5000 pages of exhibits, transcripts and affidavits. The district court said simply:

> I am satisfied that there is as a matter of law insufficient

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6. Sea-Fone's Complaint and later filed Amended Complaint asserted seven counts for relief, including violations of the Federal Communication Act (47 U.S.C. §§ 201, 202, 701(e), 731, 741); intentional interference of contract; intentional interference with prospective business advantage; theft of trade secrets (Virginia Code § 59.1-336); and RICO (18 U.S.C. § 1961, *et seq.*), all of which were summarily dismissed by the district court in an oral ruling without any analysis much less factual or legal reasoning whatsoever, all in plain violation of the Sea-Fone's constitutional right to trial by jury. This petition discusses only Count II, Sea-Fone's antitrust claim, which was the sole point addressed in the Court of Appeals' decision of July 8, 1997. Sea-Fone, of course, asserts that the denial of its right to trial by a jury affected all of its claims, each of which, as presented to the district court, raised substantial material questions of fact, which the district court either ignored, misapprehended, or overlooked without comment.

> evidence to support a claim of antitrust action by the defendants [sic] in this case. Summary judgment will be granted in favor the defendants [sic].

In affirming the district court, the Court of Appeals, without giving any factual or legal analysis for its decision, substituted its judgment for that of the jury by mischaracterizing the case as follows:

> SEA-FONE's allegations stem from its frustration in attempting to compete with Comsat and others in the market for the provision of low-cost ship-to-shore telephone service for United States naval personnel.

Slip Opinion, July 8, 1997, Appendix D, page 3.

REASONS FOR GRANTING THE WRIT

The writ should be granted to maintain the importance of private antitrust cases as a supplement to government enforcement and to preserve the right to trial by jury in antitrust cases.

The Court of Appeal mischaracterized the relevant market as "the provision of *low-cost* ship-to-shore telephone service for United States Naval personnel."

Sea-Fone respectfully submits that the obvious relevant market is the provision of ship-to-shore telephone service for United States Naval personnel. The "low cost" aspect was brought to the market by the competition of Sea-Fone, just like any competitor who breaks into a monopoly market with lower prices and better services. The facts plainly demonstrate that the market consists of all United States Naval vessels capable of ship-to-shore telephone service, approximately 229 according to Comsat's own count. Indeed, Comsat admits that control of

access to the ships themselves was a key factor enabling Comsat to coerce the Navy into excluding Sea-Fone and other competitors from this market, regardless of issues of price or technology or service.

Even up to the date that the district court entered summary judgment, Comsat continued to maintain its monopoly control over more than 97% of eligible United States Navy ships, still requiring the sailors to pay $6.25 per minute.

Consistent with Comsat's own definition, the market consists of the eligible United States Navy ships. Sea-Fone was the price cutter, the initiator of "low cost" as a usual and customary means and marketing tactic of entering a market, especially a monopolistic one. However, even if there were a question with regard to the definition of the relevant market, at the minimum the jury should decide it: "Relevant market is a factual issue which is decided by the jury." *Syufy Enterprises v. American Multicinema*, 793 F.2d 990, 994 (9th Cir. 1986). *See also Norfolk Monument Co. v. Woodlawn Mem. Gardens, Inc.*, 394 U.S. 700 (1969).

In addition, the Court of Appeals mischaracterized the basic facts of the case and simply ignored the monopolistic practices of the Comsat by stating that the suit was about Sea-Fone's "frustration in attempting to compete with Comsat and others." However, when Sea-Fone competed, there was no question about its success.

The case before the Court involves exceptional questions having a direct impact upon the private enforcement of the antitrust laws, especially in a case such as this where the private enforcement has a direct impact on the morale of tens of thousands of sailors during their active service aboard United States Naval ships. Sailors at sea are plainly entitled to have

superior telephone access to home at the lowest price which technological innovations can provide. It is essential that services provided to United States military personnel must be based on competitive merits of price, quality, and service; and if there is any question of anticompetitive interference, a jury should decide it. As this Court said:

> The right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade.

Beacon Theatres v. Westover, 359 U.S. 500, 504 (1959).

Furthermore, the Court of Appeals' decision, determining the relevant market as a matter of law, is contrary to not only opposing but conclusive evidence. Thus, a clear conflict exists between the Court of Appeals' decision in this case and other courts of appeal in which it has been long established that relevant market is a question of fact for the jury. Consequently, where, as here, Sea-Fone raises important issues of material fact related to its claim that Comsat has acted in violation of the antitrust laws of the United States, its Seventh Amendment right to have those issues decided by a jury must be respected.

CONCLUSION

For the reasons and authorities stated, and based upon the complete record in this case, Sea-Fone respectfully submits that a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JULY 8, 1997

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1672

SEA-FONE, LIMITED,

Plaintiff - Appellant,

versus

COMMUNICATIONS SATELLITE CORPORATION (COMSAT),

Defendant - Appellee,

versus

CATHERINE L. ROBINSON; CHARLES V. BAKER; SOARTA, LIMITED,

Third Party Defendants.

Appendix A

No. 96-1673

SEA-FONE, LIMITED,

Plaintiff,

versus

COMMUNICATIONS SATELLITE CORPORATION (COMSAT),

Defendant - Appellee,

versus

CHARLES V. BAKER; SOARTA, LIMITED,

Third Party Defendants - Appellants,

and

CATHERINE L. ROBINSON,

Third Party Defendant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (CA-95-1224-A)

Argued: June 4, 1997 Decided: July 8, 1997

Before WILKINSON, Chief Judge, and WILKINS and HAMILTON, Circuit Judges.

Appendix A

Affirmed by unpublished per curiam opinion.

* * *

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Sea-Fone, Limited appeals an order of the district court granting summary judgment to Communications Satellite Corporation (Comsat) on Sea-Fone's claims for antitrust violations, civil RICO, violations of the Federal Communications Act, misappropriation of trade secrets, fraud, tortious interference with contract, and breach of contract. Sea-Fone's allegations stem from its frustration in attempting to compete with Comsat and others in the market for the provision of low-cost ship-to-shore telephone service for United States naval personnel.

After carefully examining the record and the parties' briefs, and having had the benefit of oral argument, we conclude that the district court correctly granted summary judgment in favor of Comsat. Accordingly, we affirm.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION FILED APRIL 4, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION NO. 95-1224-A

SEA-FONE, LTD.

Plaintiff,

v.

COMMUNICATIONS SATELLITE CORPORATION (now known as COMSAT CORPORATION),

Defendant.

COMSAT CORPORATION,

Counter-plaintiff,

v.

SEA-FONE, LTD., CATHERINE L. ROBINSON, and CHARLES V. BAKER, and SOARTA LTD.

Counter-defendants.

Appendix B

ORDER

Before the Court is plaintiff's Motion for Reconsideration of this Court's Order of March 1, 1996, in which summary judgment on all counts of the complaint was granted. Plaintiff has moved for reconsideration on the grounds that the Court "overlooked and misapprehended material points of fact and law" and exceptional and important questions are presented. After carefully reviewing the briefs submitted by counsel, the Court finds that plaintiff has merely reformulated the arguments raised in its original opposition to defendant's summary judgment motion and has not provided any new grounds which require the Court to reconsider its ruling. Therefore, the Motion is DENIED.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 4th day of April, 1996.

s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

APPENDIX C —ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION FILED MARCH 1, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 95-1224-A

SEA-FONE, LTD.

Plaintiff,

v.

COMMUNICATIONS SATELLITE CORPORATION (COMSAT)

Defendant,
Counter-claimant,

---

v.

CATHERINE ROBINSON, *et al.*,

Counter-defendants,
Counter-claimant,

v.

COMMUNICATIONS SATELLITE CORPORATION (COMSAT)

Counter-defendant.

Appendix C

ORDER

For the reasons stated in open court, Defendant COMSAT's Motion for Summary Judgment is GRANTED, and it is hereby

ORDERED that judgment be and is entered in favor of Defendant COMSAT as to all counts of the Amended Complaint and Count IV (Breach of Contract) of COMSAT's Amended Counterclaim, and it is further

ORDERED that judgment be and is entered in favor of COMSAT against Counter-defendants Sea-Fone, Catherine Robinson, Charles V. Baker, and Soarta, Ltd. jointly and severally in the amount of $103,170.

Defendant COMSAT's Motion for Summary Judgment as to Counterclaims of Soarta, Ltd. and Charles V. Baker is GRANTED, and it is hereby

ORDERED that judgment be and is entered in favor of Defendant COMSAT as to all counts of the Counterclaims.

Plaintiff's Motion for Oral Argument on the Issue of Antitrust Immunity is moot.

The Joint Motion by Baker and Soarta, Ltd. to Refuse to Hear and/or Deny Summary Judgment of COMSAT is DENIED.

The Motion in Limine by Soarta, Ltd. and Baker to Exclude Parts of the Testimony of COMSAT's Expert William Keevan is moot.

Plaintiff's Motion to Join in Motion of Counter-defendants

Appendix C

Soarta, Ltd. and Baker to Exclude Expert of COMSAT Witness William Keevan is moot.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 1st day of March, 1996.

s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 5, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1672
CA-95-1224-A

SEA-FONE, LIMITED

Plaintiff - Appellant

v.

COMMUNICATIONS SATELLITE CORPORATION (COMSAT)

Defendant - Appellee

v.

CATHERINE L. ROBINSON; CHARLES V. BAKER; SOARTA, LIMITED

Third Party Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member

of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that is should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK